(1)

Supreme Court, U.S.
FILED

931321 DEC 7 1993

OFFICE OF THE CLERK

DOCKET NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PAUL C. FRENCH, JR. AND FUTUREGRAPHICS, Ltd.

Petitioners
-vs-

EASTMAN KODAK COMPANY
Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

FOR THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

Bruce Comly French
Ohio Northern University College of Law
525 S. Main Street
Ada, Ohio 45810
(419) 772-2216
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER, FUTUREGRAPHICS, Ltd., SHOULD BE ALLOWED TO APPEAR PROPRIA PERSONA, BY PAUL C. FRENCH, JR., CHAIRMAN AND CEO OF FUTUREGRAPHICS, Ltd., WHEN DUE TO ACTIONS BY RESPONDENT, EASTMAN KODAK COMPANY, PETITIONER WAS UNABLE TO AFFORD COUNSEL TO DEFEND ITSELF?

II. WHETHER MICHIGAN STATUTE, MSA 21.311; MCL 450.681, AS DRAFTED BY THE MICHIGAN LEGISLATURE AND APPLIED AND INTERPRETED BY THE COURTS OF THE STATE OF MICHIGAN AS FORBIDDING A CORPORATION THE RIGHT TO APPEAR PROPRIA PERSONA, IS UNCONSTITUTIONAL AND A VIOLATION UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE MICHIGAN CONSTITUTION?

III. WHETHER MICHIGAN STATUTE, MSA 21.311; MCL 450.681, AS DRAFTED BY THE MICHIGAN LEGISLATURE AND APPLIED AND INTERPRETED BY THE COURTS OF THE STATE OF MICHIGAN AS FORBIDDING A CORPORATION THE RIGHT TO APPEAR PROPRIA, DIRECTLY DENIES PETITIONER, FUTUREGRAPHICS, LTD., ITS' DAY IN COURT AND EQUAL PROTECTION UNDER THE LAW AS PROVIDED BY ARTICLE I, SECTIONS 2 AND 13 OF THE MICHIGAN CONSTITUTION?

IV. WHETHER PETITIONER, PAUL C. FRENCH,

JR., HAS STANDING TO BRING SUIT AGAINST RESPONDENT, EASTMAN KODAK COMPANY, FOR BREACH OF REPRESENTATIONS MADE TO PETITIONER BY RESPONDENT WITH THE KNOWLEDGE OF PETITIONER'S STATUS AS A CREDITOR, SHAREHOLDER AND OFFICER OF FUTUREGRAPHICS, LTD.?

V. WHETHER PETITIONER, PAUL C. FRENCH, JR., HAS STANDING TO BRING THIS ACTION AS SET FORTH IN ARTICLE III, SECTION 2 OF THE UNITED STATES CONSTITUTION?

VI. WHETHER PETITIONER, PAUL C. FRENCH, JR., IS A REAL PARTY IN INTEREST AS DESCRIBED IN MICHIGAN STATUTE, MSA 27A.2041; MCL 600.2041?

LIST OF ALL PARTIES TO THESE PROCEEDINGS

Paul C. French, Jr.
Petitioner

FutureGraphics, Ltd.
Petitioner

Eastman Kodak Company
Respondent

The Ninth Judicial Circuit
County of Kalamazoo
State of Michigan
The Honorable Judge John F. Foley

The Court of Appeals
State of Michigan
Presiding Judge William B. Murphy

The Court of Appeals
State of Michigan
Presiding Judge Michael J. Connor

The Michigan Supreme Court
State of Michigan
Chief Judge Michael F. Cavanagh

TABLE OF CONTENTS

Questions Presented.....i

List of Participants.....iii

Opinions Below.....x

Jurisdiction.....1

Constitutional Provision and Statutes Involved.....3

Statement of the Case.....7

Reasons for Granting the Writ.....18

A. This Court Should Hold that the Section of Michigan Statute, MSA 21.311; MCL 450.681, as Drafted by the Legislature and Applied and Interpreted by the Michigan Courts as Forbidding a Corporation the Right to Appear Propria Persona is Unconstitutional Under Both the United States Constitutions and Michigan Constitution and Should be Stricken Down Being Declared Null and Void.....18

B. Michigan Statute, MSA 21.311; MCL 450.681, is Unconstitutional Under the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Michigan Constitution.....21

C. Michigan Statute, MSA 21.311; MCL 450.681, Denies Petitioners Due Process and Equal Protection Under

the Law as Provided by Article I, Sections 2 and 13 of the Michigan Constitution.....29

D. Petitioner Has Standing to Bring This Action as Set Forth in Article III, Section 2 of the Unites States Constitution.....40

E. Summary: The Constitutional Rights of Petitioners Demand That a Writ Issue to Allow Petitioner to Proceed Based on the Merits of the Case.....59

Conclusion.....61

Appendices.....1a

Stipulation and Order for Default Judgment and Dismissal of CounterComplaint of the Ninth Judicial Circuit Court (unpublished).....5a

Motion For Summary Disposition and Order Granting Kodak's Motion For Summary Disposition of the Ninth Judicial Circuit Court (unpublished).....8a

Order Denying Petitioner, FutureGraphics, Ltd., Application for Leave to Appeal of the Michigan Court of Appeals.....32a

Order Denying Petitioner, Paul C. French, Jr., Application for Leave to Appeal of the Michigan Court of Appeals.....33a

Order Denying Petitioner, FutureGraphics, Ltd., Application for Leave to Appeal of the Michigan Supreme Court.....34a

Order Denying Petitioner, Paul C. French, Jr., Application for Leave to Appeal of the Michigan Supreme Court.....35a

TABLE OF AUTHORITIES

CASES:

Franchise Tax Board of California Et Al v Alcan Aluminum, 494 US 331; 110 S Ct 661; 107 L Ed 2d 696 (1990).....41,46

Gaff v Federal Deposit Insurance Corporation, 814 F 2d 311 (1987).....58,59

Harold Warren v Manufacturers National Bank of Detroit, 759 F 2d 542 (1985).....55

In Hannah Et Al v Larche Et Al, 363 US 420; 80 S Ct 1502; 4 L Ed 2d 1307 (1960).....23

In Re William S Ellis, Jr, 53 Haw 23; 487 P 2d 286 (1971).....36

In the Matter of Perry, 148 Mich App 601 (1986).....24

Kearns v Michigan Iron & Coke Company, 340 Mich 577; 66 NW 2d 230 (1954).....47

Lud v Howard, 161 Mich App 603; 411 NW 2d 792 (1987).....50

Margaret Maunder Associates Inc v A-Copy, 40 Conn Supp 361 (1985).....35

Michigan National Bank v Mudgett, 178 Mich App 677; 444 NW 2d 534 (1989)....52

Norman Shy v Metro Passbook Inc and David Kersh; Norman Shy v Metro Publications Inc, 481 NW 2d 351

(1992).....33

Parsons v Russell, 11 Mich 113 (83 Am Dec 728).....27

Peters v Desnick, 171 Mich App 283 (1988).....11,12

Rassner v Federal Collateral Society Inc, 299 Mich 206; 300 NW 45 (1941)...27

State Bar of Michigan v Galloway Michigan Hospital Ass'n v Employment Security Board of Review, 422 Mich 188; 369 NW 2d 839 (1985).....32,33

Toledo AA and NM Ry Co v Detroit L and NR Co, 62 Mich 564; 29 NW 500 (1886).....23

Turnbull v Prentiss Lumber Co, 55 Mich 387; 21 NW 375 (1884).....22

Wojnicz v Department of Corrections, 32 Mich App 121; 188 NW 2d 251(1971).....26

CONSTITUTIONS:

Article III, Section 2 of U.S. Constitution.....4,21,29,40

Amendment XIV, Section 1 of U.S. Constitution.....3,21

Article I, Section 2 of Michigan Constitution.....4,21

Article I, Section 13 of Michigan Constitution.....5,21,30,34,40

Article I, Section 17 of Michigan

Constitution.....5,22,29

STATUTES:

MSA 21.200(261)(b); MCL450.1261(b)
.....5,31

MSA 21.200(489); MCL 450.1489.....5

MSA 21.200(492a); MCL 450.1492(a).....6

MSA 21.311; MCL 450.681
.....6,12,19,21,25,28,29

MSA 27A.2041; MCL 600.2041.....7,40

MISCELLANEOUS:

Fletcher's Cyclopedia on Corporations,
Sect.7 (Perm Ed.).....22

x

OPINIONS BELOW

EASTMAN KODAK COMPANY v FUTUREGRAPHICS, LTD

In the case of Eastman Kodak Company v FutureGraphics, Ltd., the Ninth Judicial Circuit Court, County of Kalamazoo, denied the defendant the right to file an answer to a complaint, or to file a counter-complaint by it's Chief Executive Officer, because said person was not an attorney. However, a stipulation from the same corporate officer was accepted by the Court as a basis of a stipulated default judgment. It is reprinted in the appendices herein, p.5a.

The Court of Appeals, State of Michigan, dismissed the application for Leave to Appeal because a non-attorney cannot represent the defendant in this Court. The Court also would not have

granted the application for Leave to Appeal because it was filed fifteen months late without any valid excuse for lateness and finally, because the May 31, 1991, stipulation and order, acts as a consent judgment, which cannot be appealed. It is reprinted in the appendices herein, p.32a.

The Supreme Court, State of Michigan, denied application for Leave to Appeal because they were not persuaded that the questions presented should be reviewed by that Court. Two Judges disagreed. Justice Dorothy Comstock Riley would grant leave to appeal and Justice Charles L. Levin would grant leave to appeal to consider whether the defendant corporation should have been permitted to defend this action through it's chief executive officer, who is not an attorney. It is

reprinted in the appendices herein, p. 34a.

PAUL C FRENCH, JR v EASTMAN KODAK COMPANY

In the matter of Paul C French, Jr v Eastman Kodak Company, the Ninth Judicial Circuit Court, County of Kalamazoo, dismissed the suit by granting Defendant's Motion for Summary Judgment on the basis that Plaintiff did not have standing to sue. It is reprinted in the appendices herein, p. 8a.

The Court of Appeals, State of Michigan, denied the application for Leave to Appeal for the lack of merit in the grounds presented. It is reprinted in the appendices herein, p. 33a.

The Supreme Court, State of Michigan, denied application for Leave to Appeal because they were not

persuaded that the questions presented should be reviewed by that Court. It is reprinted in the appendices herein, p. 35a.

JURISDICTION

Petitioners, FutureGraphics, Ltd., and Paul C. French, Jr., respectfully ask that a Writ of Certiorari issue to review the Stipulation and Order for Default Judgment and Dismissal of Counter-Complaint issued by the Honorable John F. Foley, Ninth Judicial Circuit Court, County of Kalamazoo, State of Michigan, in case # 90-002910-CK, **Eastman Kodak Company v FutureGraphics, Ltd**, on May 31, 1991, and an Order issued by the Court of Appeals, State of Michigan, in case # 157484, dismissing the application for leave to appeal on November 18, 1992, and an Order issued by Michigan Supreme

Court, in case # 95409, denying the application for leave to appeal on September 17, 1993.

Petitioners, FutureGraphics, Ltd., and Paul C. French, Jr., respectfully ask that a Writ of Certiorari issue to review a Motion for Summary Judgment and Order issued by the Honorable John F. Foley, Ninth Judicial Circuit Court, County of Kalamazoo, State of Michigan in case # 91-01309-CK, **Paul C French, Jr v Eastman Kodak Company**, on September 6, 1991, and an Order issued by the Court of Appeals, State of Michigan, in case # 157713, denying application for leave to appeal on February 17, 1993, and an Order issued by the Michigan Supreme Court, in case # 96074, denying the application for leave to appeal on September 27, 1993.

Petitioners, FutureGraphics, Ltd.,

and Paul C. French, Jr., respectfully ask that a Writ of Certiorari issue to review the Orders of the Michigan Supreme Court, case # 95409 and case # 96074, entered on September 17, 1993 and September 27,1993,respectively. Petitioners ask for an exercise of this Court's power because a State Court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

" All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, Section 2, of the United States Constitution provides:

" The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. "

Article I, Section 2 of the Michigan Constitution provides:

" No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation. "

Article I, Section 13 of the

Michigan Constitution provides:

" A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney. "

Article I, Section 17 of the

Michigan Constitution provides:

" No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed. "

Michigan Statute, MSA

21.200(261((b); MCL 450.1261(b),

provides:

" A corporation .... shall have power in furtherance of its corporate purposes to: (b) Sue and be sued in all courts and participate in actions and proceedings, judicial, administrative, arbitrative, or otherwise, in the same manner as natural persons... "

Michigan Statute, MSA 21.200(489); MCL 450.1489, provides:

" A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located, to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation, or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:...."

" (f) Award of damages to the corporation or a shareholder."

Michigan Statute, MSA 21.200(492a); MCL 450.1492a, provides:

" A person may not commence or maintain a derivative proceeding unless the person meets all of the following criteria:

(a) He or she was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time.

(b) He or she fairly and adequately represents the interests of the corporation in enforcing the right of the corporation."

Michigan Statute, MSA 21.311; MCL 450.681, provides:

" .... It shall be unlawful further for any corporation or voluntary association to solicit itself or by or through its' officers, agents or employees any claim or demand for the purpose of bringing an action thereon ....".

Michigan Statute, MSA 27A.2041; MCL 600.2041, provides:

" Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust,....., or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action was brought, and further...".

STATEMENT OF THE CASES

EASTMAN KODAK COMPANY v FUTUREGRAPHICS, LTD

Paul C. French, Jr., is a resident of the State of Michigan and a major creditor and shareholder of a Michigan corporation known as FutureGraphics, Ltd., who is also a Petitioner in this

matter through Bruce Comly French, Attorney on behalf of Petitioners Paul C. French, Jr., and FutureGraphics, Ltd. The Respondent, Eastman Kodak Company, is a New Jersey Corporation with its principal place of business in Rochester, New York.

In July of 1988, the Respondent and Petitioner, FutureGraphics, Ltd., entered into a rental agreement. Under the terms of the written agreement, Kodak was to provide certain equipment and services for prices identified in that agreement.

The units were installed in FutureGraphics, Ltd., place of business during the months of August/September of 1988. From the beginning the equipment did not perform as represented and the ColorEdge that was installed, never consistently produced commercial quality

output on a dependable basis particularly when more than a few copies were required.

In September of 1989 the ColorEdge Copier was removed from FutureGraphics, Ltd., place of business. In May of 1990, the Extaprint 235 AF Copier-Duplicator was removed from FutureGraphics, Ltd., place of business. These copiers were removed at the request of Paul C. French because of non-performance and the substantial damage to the business and reputation caused by the consistent failure of these copiers.

On October 10, 1990, Respondent, Eastman Kodak Company, brought a breach of contract action against Petitioner, FutureGraphics, Ltd., seeking money damages in an amount equal to the full amount due under the rental agreement.

On November 12, 1990, Paul C. French, Jr., as an officer of FutureGraphics, Ltd., answered the complaint and filed a counter-complaint on behalf of FutureGraphics, Ltd.

Both parties proceeded with discovery, submitting written interrogatories, requests for production of documents, preparing and submitting pretrial statements, etc. At a pretrial hearing, Paul C. French informed the Lower Court Judge that Eastman Kodak was not cooperating by answering his discovery requests, and the Judge stated, " Mr. French, now you are going to find out what practicing law is all about. What you have to do is file a motion to compel discovery."

At that point Mr. French thanked Judge Foley, and handed him a copy of his motion to compel discovery and

handed another copy to counsel for Kodak. Mr. French then asked the Judge if Kodak had received sufficient notice and service. A few days later on April 23, 1991, Mr. French received a letter dated April 18, 1991, from the Ninth Judicial Circuit, signed by the Honorable John F. Foley, Circuit Court Judge.

The body of this letter was as follows, " Dear Mr. French, Please be advised that a corporation can only appear in court by an attorney. Peters v Desnick, 171 Mich App 283 (1988). An answer to the complaint signed by an attorney must be filed in the above case within 28 days from the day you receive this letter. If the answer is not filed, on motion of the plaintiff, your pleadings may be stricken and a default entered. " This letter is reprinted in

the appendices herein, p. 36a.

The Circuit Court refused to hear FutureGraphics, Ltd., claim unless an attorney was retained to represent them. Again citing that Peters v Desnick, held that MSA 21.311, MCL 450.681, made it unlawful for a corporation to appear propria persona. Having no choice and being forced to its knees, FutureGraphics, Ltd., was forced to accept a default judgment.

This Stipulation and Order for Default Judgment and Dismissal of Counter-Complaint was entered on May 31, 1991 by the Honorable John F. Foley, Circuit Court Judge. It is reprinted in the appendices herein, p. 5a.

Mr. French then began working and researching on an appeal. He filed this appeal on October 16, 1992, pursuant to MCR 7.205 (F), "Leave to File Late

Appeal" within the 18 month time limit. On November 18, 1992, the Michigan Court of Appeals issued an order dismissing Petitioner's application for leave to appeal. This Order is reprinted in the appendices herein, p. 32a

On December 9, 1992, Mr. French filed on behalf of FutureGraphics, Ltd., Application for Leave to Appeal from Decision of Court of Appeals with the Michigan Supreme Court. On September 17, 1993, the Members of this Honorable Court issued an Order denying the application for leave to appeal. The Majority of the Members were not persuaded that the questions presented should be reviewed by the court. Two members, Justice Riley and Justice Levin, would grant leave to appeal.

PAUL C FRENCH v EASTMAN KODAK COMPANY

Prior to the Ninth District Court

entering its order in Eastman Kodak Company v FutureGraphics, Ltd., on May 1, 1991, Mr. French filed suit as a large creditor and stockholder of FutureGraphics, Ltd., against Eastman Kodak Company based on the same factual situation. Mr. French filed seeking damages not only for the devaluation of his stock caused by Kodak's conduct and contract breaches, but also for the personal financial losses he suffered as a creditor of FutureGraphics, Ltd.

The Petitioner maintains that at the time Kodak's representatives made numerous representations and promises to him, these representatives were aware not only of his capacity as an officer of the corporation, but also of the fact that he was a creditor of the corporation and would personally be providing the capital necessary to enter

into these leasing agreements.

The Ninth Judicial Circuit Court granted Respondents motion for summary disposition and entered an Order granting said motion on September 18, 1991. The Honorable John F. Foley held that Mr. French was not a real party in interest, but that he was attempting to seek redress for injuries suffered by FutureGraphics, Ltd., and that Mr. French suffered no injury separate from the other shareholders. This Order is reprinted in the appendices herein, p. 8a.

The Ninth Judicial Circuit Court did not allow Mr. French to present any evidence of his separate injury and how it could come to the conclusion that he suffered only the same injury as the other shareholders without entertaining any offer of proof on the matter is

inconceivable.

Mr. French filed application for leave to appeal with the Court of Appeals, State of Michigan, on October 21, 1992. The relief he sought from the Members of the Court was that he be granted standing to maintain this suit and have it remanded back to the Ninth Judicial Circuit to proceed on its merits, or in the alternative, an evidentiary hearing be held to determine if Mr. French suffered an injury separate from that generally suffered by the other shareholders; therefore giving him standing to bring this claim against Eastman Kodak Company.

On February 17, 1993, the Court of Appeals, State of Michigan issued an Order denying Mr. French's application for leave to appeal. The reason stated for such denial was for lack of merit in

the grounds presented. This Order is reprinted in the appendices herein, p. 33a.

On March 11, 1993, Mr. French filed Application for Leave to Appeal from Decision of Court of Appeals with the Michigan Supreme Court. On September 27, 1993, the Members of the Michigan Supreme Court entered an Order denying his application for leave to appeal. The Members stated they were not persuaded that the questions presented should be reviewed by this Court. This Order is reprinted in the appendices herein, p. 35a.

The Petitioners respectfully request that this Honorable Court consider the consolidation of these two cases and decide that the Michigan Statute denying a corporation the right to appear propria persona is

unconstitutional, and determine that Paul C. French has standing, remanding these cases to the Ninth Judicial Circuit Court, County of Kalamazoo, State of Michigan, with instructions for the cases to proceed on the merits.

THE WRIT OF CERTIORARI SHOULD ISSUE TO PROVIDE THE PETITIONERS THEIR CONSTITUTIONAL ENTITLEMENTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW

A. This Court Should Hold that the Section of Michigan Statute, MSA 21.311; MCL 450.681, as Drafted by the Legislature and Applied and Interpreted by the Michigan Courts as Forbidding a Corporation the Right to Appear Propria Persona is Unconstitutional Under Both the United States Constitution and the Michigan Constitution.

Petitioners do not in any way

maintain that corporations should be allowed to practice law in a sense of offering such services to the public. Petitioners do maintain that application of a section of MSA 21.311; MCL 450.681, which states, ".... It shall be unlawful further for any corporation or voluntary association to solicit itself or by or through its officers, agents or employees any claim or demand for the purpose of bringing an action thereon....", to the particular circumstances in this case is unconstitutional as a violation of due process and equal protection under the law.

Denying Petitioners the right to defend or bring a claim in propria persona leaves the Petitioners without any method of seeking redress for wrongs committed against it or even defending a

lawsuit filed against it. The lower court would not allow Petitioner to appear propria persona thereby forcing Petitioner to accept a default judgment. The restriction of requiring a corporation to hire an attorney, and that an attorney must sign all complaints, answers, motions, etc., when the corporation has no financial resources to obtain an attorney and is unable to obtain counsel, leaves a corporation no method of defending itself or having its cause heard in a court of law.

When such restriction prevents a corporation from representing itself through a person, officer or shareholder of its choice, as a matter of choice or when a corporation, by necessity is unable to retain counsel and therefore is denied access to the judicial

process, such restriction results in the loss to the corporation of equal protection under the law and effectively causes the loss of corporate property without due process, and without any reasonable and compelling State interest other than to enrich one party at the expense of another party, all in violation of the Fourteenth Amendment of the United States Constitution and in violation of Article I, Sections 2, 13, and 17, of the Michigan Constitution of 1963.

Michigan Statute, MSA 21.311; MCL 450.681 is Unconstitutional Under the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Michigan Constitution

The Fourteenth Amendment of the United States Constitution, Section 1, states, "... nor shall any state deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article I, Section 17 of the Michigan Constitution provides, in part,

" No person shall be...., nor be deprived of life, liberty, or property, without due process of law...".

The general rule is that the construction of the word "person" in a statute or a constitutional provision may embrace a corporation whenever this is necessary. (Turnbull v Prentiss Lumber Co, 55 Mich 387, 21 NW 375 (1884)). Thus a corporation is a "person" within the meaning of the Fourteenth Amendment of the Federal Constitution. (Fletcher Cyc Corp, Section 7, Perm Ed.)

It follows that a corporation

cannot be deprived of life, liberty or property without due process of law and that it is entitled to the equal protection of the law in a like manner as other persons in the same situation. (Toledo, AA & NM Ry Co v Detroit, L & NR Co, 62 Mich 564, 29 NW 500 (1886)).

In Hannah Et Al v Larche Et Al, 363 US 24420; 80 S Ct 1502; 4 L Ed 2d 1307 (1960), the members of the Supreme Court stated, "Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to the specific factual contexts. Thus when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."

"... Whether the constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."

The Members of the Michigan Court of Appeals, In the Matter of Perry, 148 Mich App 601 (1986), stated, "The process that is due under the Fourteenth Amendment is not susceptible to precise definition and, therefore, must be determined on a case-by-case basis with reference to a particular situation by first considering relevant precedents and then assessing the several interests at stake."

First the nature of the alleged

right involved. Without question, Petitioners' property rights have been stripped away by the action of Kodak. Next the nature of the proceeding involved. Petitioner was sued by Kodak in the Ninth Judicial Circuit Court. Petitioner was not given an opportunity to respond to the allegations of Respondent by application of a section of MSA 21.311; MCL 450.681. This statute allows a corporation in Petitioner's circumstances to have its property taken without even having a hearing on the matter.

Third the possible burden on the lower court that might have evolved if Petitioner was allowed to have its case heard. The only burden that would have occurred is the same burden that the court must suffer when a "natural person" appears in propria persona.

This is a burden that the courts must suffer as mandated by Article I, Section 13, of the Michigan Constitution of 1963.

Due process of law, when property rights are involved, is law in its regular course of administration through the courts of justice, and is subject to those restraints as are reasonably necessary for the public good. Underlying the concept of due process is the right not to have determinations affecting one's rights made in an arbitrary and capricious manner without the existence of reasonable standards.

In Wojnicz v Department of Corrections, 32 Mich App 121, 188 Nw 2d 251 (1971), the Members of the Michigan Court of Appeals addressed the issue of taking one's property by State action. They said, "It has long been a basic

legal principle within this country that one cannot be deprived of his property by state action without due process of law." "....Whatever else may be uncertain about the definition of the term "due process of law", all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The Members of the Michigan Supreme Court, in Rassner v Federal Collateral Society, Inc, 299 Mich 206, 300 NW 45 (1941), address the concept of due process quoting the court in Parsons v Russell, 11 Mich 113 (83 Am Dec 728). This court said, "Whatever may be the difficulty of defining this phrase of the Constitution when sought to be

applied to other proceedings, when used in relation to those of a judicial character, it is evidently, and has been so universally held, intended to secure to the citizen the right to a trial according to the forms of law of the questions of his liability and responsibility, before his person or his property shall be condemned." "Judicial action is in such cases imperatively required, and implies and includes actor, reus, judex--regular allegations, opportunity to answer, and trial according to some settled course of judicial proceedings."

The legislature is to determine who may sue and be sued, so long as it does not interfere with vested rights or deny any remedy. Petitioner maintains MSA 21.311; MCL 450.681 does not provide corporations in Petitioner's position

any remedy to protect their property rights. By not allowing Petitioner to appear in court, Petitioner was refused an opportunity to answer and defend itself as required by Article I, Section 17 of the Michigan Constitution and the Fourteenth Amendment of the United States Constitution.

Michigan Statute, MSA 21.311; MCL 450.681, Denies Petitioners Due Process and Equal Protection Under the Law as Provided by Article I, Sections 2 and 13 of the Michigan Constitution

In the Michigan legislature's attempt to protect the public from the unauthorized practice of law the section of MSA 21.311; MCL 450.681, which prevents corporations from appearing propria persona, results in a violation of Petitioners right to equal protection under the law as provided by the

Michigan Constitution.

Article I, Section 2, of the Michigan Constitution provides, " No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."

Article I, Section 13 of the Michigan Constitution provides, " A suitor in any court of this State has the right to prosecute or defend his suit, either in his own proper person or by an attorney."

The statute in question is MSA 21.311; MCL 450.681, which is titled, " Practice of law by corporations or

voluntary associations prohibited; exceptions; penalty." The legislature's intent in creating this statute is to protect the public from the unauthorized practice of law by corporations. However, in Petitioners situation it is not trying to represent any members of the public but only trying to represent itself in defending a lawsuit filed against it by Eastman Kodak.

The relevant part of the statute provides, "... It shall be unlawful further for any corporation or voluntary association to solicit itself or by or through its officers, agents or employees any claim or demand for the purpose of bringing an action thereon...", and this section has been interpreted by the courts as preventing corporations from appearing in propria persona.

In direct conflict with this statute is MSA 21.200(261); MCL 450.1261, titled " Corporate Powers ". Section (b) titled " Actions " provides, " ... Sue and be sued in all courts and participate in actions and proceedings, judicial, administrative, arbitrative or otherwise, in the same manner as natural persons ".

In State Bar of Michigan v Galloway, 124 Mich App 271; 335 NW 2d 475 (1983), the Members of the Court were faced with two statutes that conflicted with each other. The Members decided that the later statute permits non-lawyers to represent employers in quasi-judicial proceedings before Michigan Employment Security referees. The Michigan Court of Appeals resolved the statutory conflict by considering the statutes in pari materia and

concluding that the more recent and more specific statute should be interpreted as an exception to the older and more general statutes. The Supreme Court of Michigan affirmed that decision in State Bar of Michigan v Galloway Michigan Hospital Association v Employment Security Board of Review, 422 Mich 188; 369 NW 2d 839 (1985).

Case law in Michigan and around the country has gradually addressed several aspects of the conflicts raised by prohibiting a corporation from representing itself in an action at law and many exceptions have been created.

On March 13, 1992, the Members of the Supreme Court of Michigan, in Norman Shy v Metro Passbook, Inc and David Kersh; Norman Shy v Metro Publications, Inc 481 NW 2d 351 (1992), addressed the general rule that a corporation may

appear in court only by an attorney. The Michigan Supreme Court refused to grant leave to appeal but Justice Levin expressed his disagreement with the stated basis of the Appeals Court's disposition. He mentions the numerous exceptions to the general rule in particular the sole shareholder exception. Justice Levin states, " The rule applied by the Court of Appeals is hypertechnical as applied to Kersh under the circumstances....The Court of Appeals pierced the veil in the interest of justice, but never the less, presumably also in the interest of justice, refused to let Kersh speak for himself and be heard unless he hires an attorney. That does not appear to advance any interest of justice".

Justice Levin then continues, " I acknowledge that a person who is not an

attorney is more likely than an attorney to burden other litigants and the court with time-consuming, meritless arguments and with time-consuming delays attributable to noncompliance with procedural requirements. " " But that is an argument against allowing persons who are not attorneys to appear at all, not for distinguishing between allowing a person who is not an attorney representation in propria persona, which is permitted, and allowing a person who is not an attorney to represent a corporation of which the person is the sole shareholder or has been held to be an alter ego ".

In Margaret Maunder Associates, Inc v A-Copy, 40 Conn Supp 361 (1985), the Members of the Court found the rules and standards governing the practice of law are for the protection of the public and

not for the creation of a private advantage for attorneys. The court further found that the representation of a corporation by its' sole shareholder was not a threat to the public. The members of the Court also said since the "practice of law" involves giving legal advice or rendering legal services to others, a sole shareholder representing the corporation is in effect acting personally.

The members of the Supreme Court of Hawaii, In Re William S Ellis, Jr, 53 Haw 23;487 P2d 286 (1971), addressed a nearly identical situation where a stockholder or creditor's property is subject to deprivation without him having his "day in court". The Members of the Court believed the basic requisites of "due process" guarantee that when their property rights may be

affected,notice and an opportunity to be heard must be afforded to all interested persons. This court created an exception to the general rule, " In the limited situation where the statutory liquidator makes a showing that corporate funds are unavailable for the hiring of counsel, he may perform the necessary legal service ".

The cornerstone of this decision and execution was the claim of insufficient assets. This is the very fact in this case. After its dealings with Kodak, Petitioner was stripped of the financial ability needed to obtain legal representation to defend itself against the suit filed by Kodak.

The basic constitutional issue of due process and equal protection under the law needs to be directly and fully addressed. Exceptions are indicative of

the Court's view of the inequity of the position previously taken in case law, when the matters are taken and considered as a whole.

Corporations have long been determined "persons" in regards to the language used in the U.S. Constitution, Michigan Constitution, and various statutes. Corporations with the financial resources to hire attorneys certainly have the right to appear in court to redress wrongs committed against them. Natural persons have the right to appear in court with or without an attorney. But in the instant case Petitioner is being denied its right to redress wrongs committed against it by Kodak, solely because it lacks the financial resources to hire an attorney.

Petitioner believes this statutory classification rests on grounds wholly

irrelevant to the achievement of the State's objective. If the reasoning of the State is that a person who is not an attorney is more likely than an attorney to burden other litigants and the court with meritless arguments, time, delays, etc., then that it an argument against allowing persons who are not attorneys to appear at all, not for distinguishing between natural persons and corporations.

If the reasoning of the State is to protect the public by not allowing a corporation to represent itself, this does not make any rational sense because self representation by a corporation poses no threat to the public at all. If Petitioner wishes to represent itself, it may have a fool for a client, but it is no different than a "natural person" choosing to represent himself.

Does a corporation have the right to represent itself, if it chooses to do so? Petitioner asserts that corporations have this right, by statute, by case law and a provided by Article I, Sections 2 and 13 of the Michigan Constitution and the Fourteenth Amendment to the U.S. Constitution.

The Petitioner has Standing to Bring this Action as Set Forth in Article III, Section 2 of the United States Constitution and is a Real Party in Interest as Described in MSA 27A.2041; MCL 600.2041

Judge Foley, of the Ninth Judicial Circuit Court, County of Kalamazoo, State of Michigan, stated Mr. French was not a real party in interest and had no standing to maintain this action against Eastman Kodak. Petitioner believes this conclusion was in error and bases this

belief on the definition of standing as stated by the Members of the United States Supreme Court.

In Franchise Tax Board of California Et Al v Alcan Aluminum Ltd Et Al, 493 US 331, 110 S Ct 661, 107 L Ed 2d 696 (1990), the Members of the United States Supreme Court addressed the issue of standing and whether respondents had sufficient injuries to confer both Article III and stockholder standing. The Members of the Supreme Court held that respondents did have Article III standing but held their actions were barred under the Tax Injunction Act. In deciding the standing issue the Members of the Court treated standing as consisting of two related components: the constitutional requirements of Article III and nonconstitutional prudential considerations.

The Members stated, "Article III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, " and " that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision."

As both a creditor and shareholder of FutureGraphics, Ltd., Mr. French suffered severe financial losses directly caused by Eastman Kodak's breach of representations made to him and the numerous breaches and oppressive actions of Kodak towards FutureGraphics, Ltd. A judicial determination that the actions of Kodak were a breach of its duties would very likely remedy Mr. French's injuries. Based on these

facts, Mr. French has met the first component of standing as defined by the Members of the Court. The lower court did not allow him an opportunity to present proofs of his injuries in order to meet this threshold of standing.

The second component of standing is the prudential requirements of the doctrine. One of these requirements is that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Related to this principle is the so-called "shareholder standing rule".

The Members state, " the rule is a long-standing equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the

corporation's management has refused to pursue the same action for reasons other than good-faith business judgment".

First this rule is distinguishable from the instant case because the management of FutureGraphics, Ltd., attempted to defend itself and initiate a counter-suit to seek redress for the wrongs committed by Respondent. The lower court refused the corporation to appear without an attorney, and the corporation was unable to obtain representation. In the situation when a corporation is not financially able to obtain representation, and the lower court and Michigan Statutes prohibit the corporation appearing pro per, who else is left to protect the interests of the corporation but a shareholder, creditor, and an officer.

Second, the Members of the Court

state an exception to this "shareholder standing rule" exists allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated. Mr. French falls within this exception, having suffered direct injuries independent of his status as a shareholder of FutureGraphics, Ltd.

The representatives of Kodak had knowledge of his creditor status when they made representations and promises concerning certain equipment that FutureGraphics, Ltd., was considering leasing. Kodak had knowledge Mr. French was considering providing financing to FutureGraphics, Ltd., that would enable the corporation to proceed with its plans. Not only was FutureGraphics, Ltd., destroyed as a result of Kodak's

multiple breaches and oppressive actions, but the duty Kodak owed to Mr. French created by its representatives was breached resulting in the direct loss of several thousand dollars as a creditor of FutureGraphics, Ltd.

Based on the foregoing facts, Mr. French has met both the Article III and prudential requirements of standing as defined by the Members of the Court in Franchise Tax Board of California Et Al v Alcan Aluminum Ltd Et Al. The Ninth Judicial Circuit Court, County of Kalamazoo, State of Michigan, also held Mr. French was not a real party in interest as defined in MSA 27A.2041, MCL 600.2041, stating he was only trying to represent the interests of FutureGraphics, Ltd., and had suffered no separate injury other than those suffered by the other stockholders.

The section of the statute, cited above, on which Judge Foley relied reads, in part, as follows, " Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought."

In Kearns v Michigan Iron & Coke Company, 340 Mich 577, 66 NW 2d 230 (1954), the Members of the Supreme Court addressed the application of MSA 27A.2041, MCL 600.2041, and considered the reasoning behind such a statute. Quoting an earlier decision it was said, " Statutes requiring every action to be

prosecuted in the name of the real party in interest are enacted to protect defendants from being repeatedly harassed by a multiplicity of suits for the same cause of action, but so long as the defendant's rights are fully protected in the litigation, he cannot complain." "He is entitled to be protected against vexations litigations by different parties claiming to assert the same cause of action, but so long as final judgment, when and if obtained, is a full, final, and conclusive adjudication of the rights in controversy that may be pleaded in bar to any further suit instituted by any other party, the defendant is not harmed."

Certainly the rights of Kodak have been dutifully protected by the lower courts throughout the history of

Petitioners relations with Eastman Kodak. The problem is that a full, final, and conclusive adjudication of the rights involved in this controversy has never been obtained. The reasoning behind this statute does not apply to the facts in this case.

The premise of this statute is that a final judgment has been obtained and once this takes place the defendant needs protection from harassing suits that may be filed rehashing previously litigated issues. In this case the merits of the controversy were never addressed. The lower court used MSA 27A.2041, MCL 600.2041, to hold that Mr. French was trying to relitigate the same issues that had been previously dismissed against FutureGraphics, Ltd.

First, Mr. French filed his suit before any decision regarding

FutureGraphics, Ltd., and Eastman Kodak was reached. Second, the merits of the previous litigation were never considered. The use of this statute to protect Kodak goes against the reasoning behind the drafting of the statute.

In the hearing on Kodak's motion for summary disposition, Judge Foley cited many cases supporting his granting of the motion. Before I distinguish these cases from the instant case, I would like to bring to this Court's attention to one case that Judge Foley failed to mention.

In Lud v Howard, 161 Mich App 603, 411 NW 2d 792 (1987), the Michigan Court of Appeals in a consolidated action discussed the rights of shareholders to bring a cause of action. The defendants in both appeals claimed that plaintiffs

could not receive individual relief because the action was a shareholder's derivative action. However, the Court noted that plaintiffs' actions, despite being termed a shareholder's derivative action by defendants, were not solely derivative actions.

The Members of the Court stated that even if it were strictly a shareholder's derivative action, relief to the individual shareholders is not precluded. In that case, plaintiffs had requested that the sale of assets be set aside. The Court refused to do so. Thus, relief for the corporation was unavailable. The Members of the Court stated, " Under these circumstances, even though plaintiffs cannot gain the relief they sought on behalf of the corporation, that does not mean that the wrong that they may have suffered as

individuals is without remedy."

In the instant case, relief for the Petitioner, FutureGraphics, Ltd., was unavailable. The lower courts refused to allow it the only remedy available, pro per representation; therefore not allowing FutureGraphics, Ltd., the only possibility of defending itself in the action brought by Kodak.

The first case cited by the lower court was Michigan National Bank v Mudgett, 178 Mich App 677, 444 NW 2d 534 (1989), which involved defendants-counterplaintiffs appeal as of right from the order of the Muskegon Circuit Court dismissing their counterclaim against plaintiff.

Defendants argued that the trial court erred by granting plaintiff's motion for summary disposition on the basis that defendants did not have

standing to file a counterclaim against plaintiff. The Court of Appeals affirmed the lower court's decision.

The members of the Appeals Court stated generally a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee. However, the general rule is inapplicable where the individual shows a violation of duty owed directly to him. This exception does not arise merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally.

Petitioner asserts National Bank v Mudgett is distinguishable from the instant case. When Kodak's representatives met with Mr. French, Kodak was aware of his status as an officer, shareholder, and a creditor. Mr. French asked them repeatedly about the equipment in question and was assured, promised and convinced that the problems with the equipment would be corrected or had been corrected at the plant. Kodak made representations if FutureGraphics, Ltd., leased the equipment the problems would not exist. Kodak assured Mr. French that adequate support, technical and marketing, would be provided.

Petitioner maintains because of Kodak's knowledge of his creditor and shareholder status, Kodak's representations to Mr. French created a

duty owed to him and then Kodak repeatedly breached this duty resulting in financial damage to him as a creditor and also the destruction of FutureGraphics, Ltd. The exception discussed in National Bank v Mudgett directly applies to the facts and circumstances of the instant case.

The second case cited by the lower court was Harold Warren v Manufacturers National Bank of Detroit, 759 F 2d 542 (1985), in which the plaintiff asserted not only was the corporation injured, but also that he personally was injured in three separate capacities by defendant's fraudulent scheme. First as the sole shareholder of the corporation his stock became worthless, second he lost his job as Chairman and CEO of the corporation, and finally as a major creditor he was damaged by the

corporations bankruptcy. The trial court held that plaintiff in his individual capacity was not a proper party to such an action and accordingly dismissed the complaint. The question the Sixth Circuit Court of Appeals was called upon to address was whether plaintiff may bring an action in his individual capacity under RICO for injuries apparently inflicted upon the corporation. Plaintiff claimed his injuries were different from those inflicted upon the corporation, and that he had standing to pursue his claim under the any person language of 18 USC @1964.

The Members of the Sixth Circuit Appeals Court affirmed the lower courts decision. First they held in plaintiff's capacity as a shareholder of the corporation, any injury he incurred

was actually one sustained by the corporation. However the Members of the Court state this rule does not apply in a case where the shareholder shows a violation of duty owed directly to him. Petitioner maintains Kodak has a duty to Mr. French and this duty was breached by Kodak's actions.

Second the Court dismissed his claim of injury as an employee of the corporation. His claimed injury as an employee is not a basis of an independent cause of action under RICO because of the corporate injury.

Third, the Members of the Sixth Circuit Appeals Court refused to address plaintiff's claim as a creditor of the corporation. The Members of the Court stated, " We need not decide this issue, for the record does not reflect that plaintiff was a creditor of Paragon."

The lower court was in error in applying this case to Petitioner's situation. Mr. French is not filing a cause of action under the Federal RICO Statute. Second the Members of the Sixth Circuit refused to address plaintiff's claim as a creditor because of a lack of adequate record reflecting he was a creditor. Mr. French has not been allowed to present evidence of his creditor status, and if allowed, will clearly demonstrate such status. Finally, if this case in analogous to the instant one, Petitioner maintains the exception to the shareholder standing rule as discussed is applicable because a duty owed directly to Mr. French by Kodak was breached.

The third case cited by the lower court was Gaff v Federal Deposit Insurance Corporation, 814 F 2d 311

(1987) in which the Sixth Circuit Court of Appeals again addressed the issue of shareholder standing in a suit brought under the federal banking laws. The Appeals Court affirmed the lower courts decision and held the plaintiff did not have standing to maintain a suit under the federal banking laws. The Members stated, " We find that in Warren this Circuit conclusively adopted the general rule that a shareholder does not have standing to bring a direct cause of action under federal law when the only damage alleged is the diminution in the value of corporate shares."

Again this case is distinguishable from the instant one, and the lower courts reliance on Gaff v Federal Deposit Insurance Corporation was in error. As a creditor of the corporation Mr. French lost several thousand dollars

as a direct result of Kodak's actions. Kodak was aware of his creditor status when it made certain representations, and Kodak's conduct resulted in damage to Mr. French personally above and beyond the diminution in the value of his shares of stock in FutureGraphics, Ltd.

SUMMARY

Petitioner, FutureGraphics, Ltd., has not been allowed to answer the complaint filed against it by Eastman Kodak Company. The Petitioner, FutureGraphics, Ltd., has not been given the opportunity to present a defense to Eastman Kodak's claims or allowed to present evidence of counter-claims it has against Eastman Kodak for misrepresentation and breach of contract.

This injustice has occurred solely

because a Michigan Statute denies FutureGraphics, Ltd., its rights of due process and equal protection of under the law as mandated the United States Constitution and the Constitution of the State of Michigan.

Petitioner, Paul C. French, Jr., has been denied his day in court based on the reason that he lacked standing to file suit against Eastman Kodak Company as decided by the Ninth Judicial Circuit Court, County of Kalamazoo, State of Michigan. This decision was reached in error and Petitioner, Paul C. French, Jr., has standing as set forth in Article III, Section 2 of the United States Constitution.

CONCLUSION

Petitioners ask that this case be remanded to the Ninth Judicial Circuit Court, County of Kalamazoo, State of

Michigan with instructions that Petitioner, FutureGraphics, Ltd., be allowed to appear propria persona through its Chairman and CEO, Paul C. French, Jr., and that Paul C. French, Jr., has standing to bring an action against Eastman Kodak Company, and that the cases shall proceed on the merits of the claims presented.

Respectively Submitted,

Bruce Comly French
Attorney at Law
on behalf of
FutureGraphics, Ltd. and
Paul C. French, Jr.

APPENDICES

MICHIGAN STATUTES:

MSA 21.200(261)(b); MCL 450.1261(b):

"... It shall be unlawful further for any corporation or voluntary association to solicit itself or by or through its' officers, agents or employees any claim or demand for the purpose of bringing an action thereon...

"MSA 21.200(489); MCL 450.1489:

" A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located, to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation, or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:... (f) Award of damages to the corporation or a shareholder ".

MSA 21.200(492a); MCL 450.1492(a):

" A person may not commence or maintain a derivative proceeding unless the person meets all of the following criteria:

(a) He or she was a shareholder of the corporation at the time of the

act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time.

(b) He or she fairly and adequately represents the interests of the corporation in enforcing the right of the corporation ".

MSA 21.311; MCL 450.681:

" ... It shall be unlawful further for any corporation or voluntary association to solicit itself or by or through its' officers, agents or employees any claim or demand for the purpose of bringing an action thereon...".MSA 27A.2041; MCL 600.2041:

" Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust,...., or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action was brought, and further...".

CONSTITUTIONS:Art. I, Section 2 of Michigan Constitution:

" No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature

shall implement this section by appropriate legislation ".

Art. I, Section 13 of Michigan Constitution:

" A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney ".Art. I, Section 17 of Michigan Constitution:

" No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed ".

Art. III, Section 2 of U.S. Constitution:

" The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other Public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming

Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects ".

Amendment XIV, Section 1 of U.S. Constitution:

" All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ".

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KALAMAZOO

Case No. B90-2910-CK

EASTMAN KODAK COMPANY,
a New Jersey corporation,

Plaintiff and Counterdefendant,

vs.

FUTURE GRAPHICS, LTD.,
a Michigan corporation,

Defendant and CounterPlaintif

Before:

Honorable John F. Foley

STIPULATION AND ORDER FOR DEFAULT JUDGMENT AND DISMISSAL OF COUNTERCOMPLAINT

Eastman Kodak Company, by its attorneys, Dykema Gossett, and FutureGraphics, Ltd., by its Chief Executive Officer, Paul French, stipulate and agree to the entry of a Default Judgment in Eastman Kodak Company's favor in the amount of

$43.324.65. It is further stipulated and agreed that FutureGraphics, Lts.'s Countercomplaint against Eastman Kodak Company is hereby dismissed with prejudice.

DATED: May 15, 1991

DYKEMA GOSSETT
Attorneys for Eastman Kodak Company

By _____
Candice L. Sorensen (P38510_

BUSINESS ADDRESS:
200 Oldtown Riverfront Bldg.
Grand Rapids, MI 49503-0321
(616) 776-7547

FUTUREGRAPHICS, LTS.

By _____
Paul C. French, Jr.
Chairman and CEO of
FutureGraphics, Lts.

ORDER

At a session of said Count, held in the County Building, Kalamazoo County, Kalamazoo, Michigan, this 31st day of May 1991.

PRESENT: HONORABLE JOHN F. FOLEY
Circuit Judge

Upon due consideration of the parties' stipulation for the entry of a Default Judgment and the dismissal of FutureGraphics, Ltd.'s Countercomplaint,

IT IS HEREBY ORDERED that a Default Judgment enter in favor of Eastman Kodak Company and against FutureGraphics, Ltd. in the amount of $43,324.65.

IT IS FURTHER ORDERED that FutureGraphics, Ltd.'s Countercomplaint against Eastman Kodak Company is hereby dismissed with prejudice and without costs.

IT IS SO ORDERED.

JOHN F. FOLEY

_____

Honorable John F. Foley
Circuit Judge

Examined, Countersigned &
Entered

_____

Clerk

2742CLS

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KALAMAZOO

Case No. B9101309-CK

PAUL C. FRENCH, JR.,
in proper,
Plaintiff,

v

EASTMAN KODAK COMPANY,
a New Jersey Corporation,
Defendant.

Before:
Honorable John F. Foley

MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the County Building in the City and County of Kalamazoo, State of Michigan, on the 6th day of September, 1991.

Kalamazoo, Michigan
Friday, September 6, 1991
At about 1:44 P.M.
PROCEEDINGS

THE COURT: Call the case of Paul C. French versus Eastman Kodak Company, B 91-1309 CK.

Will counsel state their names for the record.

MS. SORENSEN: I'm Candace Sorensen

appearing on behalf of Eastman Kodak Company.

MR. FRENCH: Paul French appearing in pro per.

THE COURT: You may proceed.

MS. SORENSEN: Your Honor, this is Kodak's motion to dismiss the action brought by Mr. French on the grounds that Mr. French does not have standing to sue.

The facts underlying the case are these: In July of 1988, Kodak and a company called FutureGraphics Limited entered into two rental agreements for the rental of two copiers, tow of Kodak's copiers. FutureGraphics had one of the copiers for a year; had the other one for a year and a half before Kodak removed it due to nonpayment of the rental payments.

There's been some dispute between

the parties as to whether or not there were other counter-claims that FutureGraphics would have against Kodak, but Kodak filed a complaint against FutureGraphics in October of 1990 for money due and owning on account.

In November of that year, FutureGraphics filed a counter-complaint against Kodak alleging breach of implied, express and stated warranty of fitness for use for the particular purpose represented, breach of oral and written contracts, fraudulent misrepresentation and negligence.

Mr. French appeared on behalf of FutureGraphics. The company did not retain counsel. It is my understanding that Mr. French is a South African Barrister and has some training in the law and he represented the company.

In addition to filing the counter-

claim, he filed an extensive discovery request against Kodak with 87 interrogatories and corresponding document requests.

In April of 1991, the Court informed Mr. French that FutureGraphics could not represent itself in court, but that it had to retain counsel. When Mr. French chose not to retain counsel for the company, the Court indicated it would entertain a Motion to Dismiss. In order to avoid the cost to stipulate to a default judgment in which Kodak's claim for $43,324.65 was granted and FutureGraphics counter-claim against Kodak was dismissed with prejudice. That stipulated default judgment was entered on May 31, 1991.

Mr. French filed an identical action against Kodak Company in May of 1991. He filed it as himself as the

plaintiff, not on behalf of FutureGraphics. He alleged the very same facts and all of the same causes of action as those found in FutureGraphics' counter-complaint, which was dismissed with prejudice.

The basis for out motion to dismiss is that Mr. French individually has no standing to sue. He's not a real party in interest. He had no contractual relationship with Kodak and all of the contractual disputes are between Kodak and the company FutureGraphics must be redressed in an action brought by the company. Michigan case law is clear that only the company can bring such an action, not a shareholder, not an officer, not an employee, not even a sole shareholder could bring such an action and that's true regardless of whether the injury arises out of

contract or tort.

Mr. French's only claims to being able to bring such an action is that he was a major shareholder and also a creditor of the company. Again, Michigan case law indicates that being a creditor of the company does no grant him standing to sue.

Mr. French's argument in response does not address the standing issue. He never addresses whether or not he individually has standing to bring these claims against Kodak. Instead, he argues that equity is such that he should be allowed to present the action. He claims that because equitable issued are involved it requires a jury trial and I agree with Mr. French that, if he does in fact have standing to sue, the issues involved would entitle him to a jury trial; it would not be a bench

trial, but that is not the issue before the Court; the issue is a procedural one.

He also claims that the company was denied due process because the company could not afford to defend itself. He offers no case law to support that and I do not believe that any exists.

His final argument is that of clean hands or unclean hands, indicating that Kodak, because he believes Kodak did the things alleged in his complaints, that, therefore, they have unclean hands. Again, that's not the issue before the Court. Kodak is not in this motion seeking any kind of equitable relief. It is asking the Court to determine whether or not Mr. French has standing to sue the company and, to the contrary, Kodak has a default judgment against FutureGraphics for over $43,000, which

they will never voluntarily pay and yet Mr. French is the one asking the Court to somehow use equitable principles to avoid Michigan case law that indicated he may not bring this cause of action.

THE COURT: Thank you. Mr. French.

MR. FRENCH: I suppose as is the case in most disputes the facts are not always the same from both perspectives.

Yes, there were two rental agreements entered into on the dates indicated. The equipment was never repossessed. The equipment was removed at our request. There was numerous meetings and correspondence over the time period, pointing out to the company the problems in which they made representations that they would correct them and never did.

There's a long case correspondence record trail and I'm not attempting to

litigate the issue at the moment, but to point out that it was not a matter of repossession for failure to pay. We finally notified them to remove the equipment because we no longer wanted it because it wasn't performing its function.

Secondly, factual difference that might be noted. I'm not a barrister and I'm not from South Africa.

I thing the issue of standing perhaps could be addressed this way, your Honor: In a small corporation, the lines of distinction between shareholder and the corporation, particularly in a major commitment of this nature, really become multiple.

As an individual and as an officer of the corporation, we went to Kodak's offices to view some equipment and to see some demonstrations. When the

representations were made, I had to make a decision as an individual because I was going to have to put up the money as a shareholder because it already concerned an existing investment and as an officer on behalf of shareholders in general.

I believe I have an actionable interest because the corporation clearly had insufficient finances to enter into an agreement at the time it entered into it. The finances for that agreement and the payments for that agreement were really underwritten to a large extent initially by myself and therein is how I became a major creditor, because I did put in money to do that, so I believe I have a standing as an individual in this case because actually I was wearing multiple hats at the time of the presentation.

Kodak was aware that I was a shareholder. They were aware that I was an officer. We had two other officers with us, one of whom happens to have been from South Africa and who was a major contributor to helping get the company through this period and the other was one of the founding or originating people.

I believe the equitable relief is justified because the actions of kodak in relationship to me as an individual and in relationship to the corporation were fraudulent and I believe we can prove that they were fraudulent because of the misrepresentation and we are entitled to relief and entitled to a hearing before a jury of the facts, who may or may not rule our way or the other way on the merits of the facts, but are entitle to hear them.

I raise the issue of denial of due process because when a company through raw economic might destroys another company's ability to survive and even its ability to protect itself at law, for that company to be able to prosper from the results of its acts really denies due process to the company that was the aggrieved party. Again, assuming we can prove what we are alleging.

So that the damages really are both to the company and to me as an individual. The representations were made to me and to the company. They were made to me in multiple capacities at the meeting and, therefore, I personally relied upon those representations and, therefore, I personally have I believe a course of action that I believe I have standing in

this matter on the basis of those representations.

I thing the law that I've cited, the case law I've cited points out the representation, whether done deliberately or not, if relied upon and losses follow it is an actionable cause.

The clean hands theory is I guess to me is important from two standpoints: Number one, I thing that the basis of attempting to procedurally dislodge a suit based upon the alleged facts in the matter is really contrary to any form of equitable relief or any form of justice.

I think that the issue here should be remanded to trial so that the facts may be judged on their face and the proper determination made by a jury.

I assure you, your Honor, that this is not intended to be a frivolous matter.

In terms of any recovery against FutureGraphics, FutureGraphics has no funds and there's no likelihood of any funds. The whole base of the corporation has been totally destroyed. Thank you.

THE COURT: Thank you. Miss Sorensen.

Ms. Sorensen: Your Honor, I would like to point out that we do not dispute that if FutureGraphics had chosen to pursue its counter-claim that it would have been entitle to go through all of the discovery and a trial on the issues of whether or not there was any damage to the company as a result of the allegations made by FutureGraphics, but FutureGraphics dismissed that counter-complaint with prejudice and Mr. French has no, while he says he wore multiple hats, he has no basis for bringing this

action.

As a practical matter, when a company is owned by only a few individuals and if the company has any injury, even assuming that the company did have injury, as Mr. French alleges, the individuals will suffer some injury, but there's no case law that supports allowing the individual to bring the action unless there's grounds to pierce the corporate veil.

There have been no allegations that there's grounds and I refer the Court to Sherman versus British Leyland Motors Limited, which was the very same situation. One individual was the one primarily involved, who was the person who had -- was a creditor of his own company, but he Court concludes that the ..." circumstances do not warrant departure from the general rule of

separation of identities, nor..." does it afford the individual standing to bring suit in his individual capacity as a shareholder or creditor on any claims asserted in this action, and the claims were the same as we have here.

The bottom line is Mr. French has no grounds to bring this action. All injury was injury to the corporation and it was the corporation's cause of action, not Mr. French's.

If you have any questions, I'd be happy --

THE COURT: No, I don't. Thank you.

MS. SORENSEN: Thank you, your Honor.

THE COURT: All right. Defendant has brought a Motion for Summary Disposition under MCLA Section 600.2041, praying that the complaint be dismissed on the grounds that the plaintiff Mr.

French is not a real party in interest.

I'll start off with the ruling and then give my reasons.

The defendant's Motion for Summary Disposition is granted because Mr. French is not a real party in interest. The present suit arises from prior litigation; that is specifically the case of Eastman Kodak Company versus FutureGraphics Limited, B 90-2910 CK. In that lawsuit, FutureGraphics stipulated to entering a default judgment in favor of Kodak because it was unable to secure attorney representation for the corporation by an attorney as required by Michigan law, MCLA 450.681 and Peters versus Desnick, 171 Mich App 283, 1988.

In the complaint in the instant case, Mr. French is suing pro per to

recover damages allegedly caused by the breach of warranty, breach of contract, fraud and misrepresentation on the part of Kodak. In essence, Mr. French is asserting the same allegations in pro per that were dismissed with prejudice in the earlier cause of action in which FutureGraphics was a party.

Michigan law requires every action to be prosecuted in the name of the real party in interest, MCLA 2041. In general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether from contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee, National Bank versus Mudgett, 178 Mich App 677, 1989. Also found in Warren versus Manufacturers National Bank of Detroit, 759 Fed 2nd 542, 6th Circuit,

1985 and Goff versus Federal Deposit Insurance Corporation, 814 Fed 2nd 311, 6th Circuit, 1987.

Mr. French is clearly suing to redress injuries to the FutureGraphics Corporation. The entire complaint contains allegations of injury to FutureGraphics which were purportedly caused by the illegal conduct of Kodak. The key allegation of Mr. French's pleadings assert that as CEO of FutureGRaphics Kodak induced him by fraud and misrepresentation to enter into the rental agreements.

A party can sue to redress and injury to a corporation of which he is a shareholder only where the alleged violation amount to a breach of a duty owed to the shareholder personally. However, where the injury to the individual results only from the injury

to the corporation the injury is merely derivative and the individual does not have a right of action. That's Michigan National Bank cited above.

Mr. French does not allege in his complaint any breach of duty that Kodak owed to him personally. In his affidavit supporting his complaint, Mr. French admits negotiating with representatives of Kodak as CEO on behalf of FutureGraphics, not on behalf of himself.

Mr. French does not suffer personally herein because the failure of FutureGraphics caused him to lose his investment. In Michigan National Bank case, supra, Michigan Court Appeals upheld the dismissal counter-claim where defendants alleged plaintiff breached contractual as well another duties to defendants' company.

The Court concluded that the defendants did not have standing to sue even though they were controlling stockholders of the company that allegedly was injured by plaintiff's conduct. The Court concluded defendants' alleged injuries resulted from the injury to the company. That's also found in the case of Warren versus Manufacturers National Bank of Detroit, 758 Fed 2nd 544. The Court held that any injury plaintiff sustained by plaintiff in his capacity as shareholder was actually one sustained by the corporations.

Even assuming Mr. French's allegation of fraud and misrepresentation by Kodak are true, he still does not have standing to sue. Any injury Mr. French suffered due to the misrepresentation was merely

incidental to the corporation's injury because the alleged fraudulent representations were made to Mr. French as CEO of FutureGraphics, not to plaintiff as an individual.

Final point on the clean hands matter, as Miss Sorensen stated, the plaintiff here is not suing in an action of equity, so that clean hands doctrine in not applicable.

Therefore, the complaint is dismissed with prejudice.

Your may prepare the order.

MS. SORENSEN: Thank you, your Honor.

MR. FRENCH: Thank you. Will you be mailing that order:

MS. SORENSEN: I will.

THE COURT: She will prepare it and submit it. You can submit it on the 7-day order form and then she will send

you a copy.

(At about 2:06 p.m. proceedings concluded.)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KALAMAZOO

Case No. B91-1309-CK

PAUL C. FRENCH, JR.,
in pro per,

Plaintiff,

vs

EASTMAN KODAK COMPANY, a
New Jersey corporation,

Defendant.

Before:
Honorable John F. Foley

ORDER GRANTING MOTION FOR
SUMMARY DISPOSITION

At a session of said Court, held in the County Building, Kalamazoo County, Kalamazoo, Michigan, this 18th day of September, 1991.

A hearing on defendant's motion for summary disposition was held on September 6, 1991. Upon due consideration, the motion is granted, and plaintiff's Complaint against Eastman Kodak Company is dismissed with prejudice.

ITS IS SO ORDERED.

_____
Honorable John F. Foley
Circuit Judge

Examined, Countersigned &
Entered

_____
Clerk

Court of Appeals, State of Michigan

ORDER

Docket # 157484

EASTMAN KODAK CO. v FUTUREGRAPHICS, LTD.

L.C. # 90-002910 CK

William B. Murphy
Donald E. Holbrook Jr.
Barbara B. MacKenzie
Judges

The Court orders that the application for leave to appeal is DISMISSED because a non-attorney cannot represent the defendant in this Court. See Peters Production, Inc v Desnick Broadcasting Co, 171 Mich App 283, 287, (1988). The arguments raised have been considered. The Court also would not have granted the application for leave to appeal, because it was filed fifteen months late without any valid excuse for that lateness as required by MCR

7.205(F) and because the May 31 1991, order acts as a consent judgment, which cannot be appealed, see Dora v Lesinski, 351 Mich 579, 582 (1958).

Court of Appeals, State of Michigan

ORDER

Docket # 157713

Paul C. French, Jr.
v
Eastman Kodak Company

L.C. # 91-001309 CK

Michael J. Connor
Presiding Judge
Harold Hood
Helene N. White
Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

Order

Michigan Supreme Court

Entered: September 17, 1993

Docket # 95409

EASTMAN KODAK COMPANY, a New Jersy corporation,

Plaintiff-Appellee,

v

FUTUREGRAPHICS, LTD, a Michigan corporation,

Defendant-Appellant.

COA: 157484
LC: 90-002910-CK

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Riley, J., would grant leave to appeal.

Levin, J., state as follows:

I would grant leave to appeal to consider whether the defendant corporation should have been permitted to defend this action through its chief executive officer, who is not a lawyer. See Shy v Kersh, 439 Mich 855 (1991) (opinion of Levin, J.).

Order

Michigan Supreme Court

September 27, 1993

Docket # 96074

PAUL C. FRENCH, JR.,

Plaintiff-Appellant,

v

EASTMAN KODAK COMPANY, a New Jersey corporation,

Defendant-Appellee.

COA: 157713
LC: 91-01309-CK

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this court.

STATE OF MICHIGAN
NINTH JUDICIAL CIRCUIT

April 18, 1991

Mr. Paul C. French
28840 63rd Street
Bangor, MI 49013

RE: Eastman Kodak Company, a New Jersey Corporation v FutureGraphics, Ltd., a Michigan Corporation
File No. B90-2910CK

Dear Mr. French:

Please be advised that a corporation can only appear in court by an attorney. Peters v Desnick, 171 Mich App 283 (1988).

An Answer to the Complaint signed

by an attorney must be filed in the above case within 28 days from the day you receive this letter. If the answer is not filed, on motion of the plaintiff, your pleadings amy be stricken and a default entered.

Your immediate attention to this matter is recommended.

Very truly yours,

John F. Foley
Circuit Judge

JFF/neb

xc: Candace L. Sorensen
Thomas Garnett